U.S. Department of Labor

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Issue Date: 11 September 2003

CASE NO.: 2002-LHC-02046

OWCP NO.: 06-177276

In the Matter of

MICHELLE M. HOUTZ

Claimant

v.

DEPARTMENT OF THE ARMY

Employer

Appearances: Mario R. Bordogna, Esq.
For Claimant

James M. Mesnard, Esq.
Lawrence P. Postol, Esq.
(on the brief)
For Employer

Before: Robert D. Kaplan
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (the "Act"), as extended by the Defense Base Act, 42 U.S.C. § 1651, et seq., and the regulations promulgated thereunder. A hearing was held before me in Carlisle, Pennsylvania on April 17, 2003, where the parties had full opportunity to present evidence and argument. Employer and Claimant filed briefs on May 30 and July 17, 2003, respectively. Employer filed a reply brief on July 29.

I. STIPULATIONS AND CONTENTIONS OF THE PARTIES

The parties entered into the following stipulations (T 5-12)[1]:

1. Claimant was injured on July 28, 1998, at Fort Stewart, Georgia, when she hurt her lower back when lifting a cooler containing milk cartons and ice.

2. Claimant continued to work until August 11, 1998 but has not been employed since that date.

3. An employer-employee relationship existed between Employer and Claimant at the time of the injury.

4. The lower back injury arose within the course and scope of Claimant's employment with Employer.

5. As a result of the injury, Claimant was temporarily totally disabled from August 11, 1998 until at least January 24, 2001.

6. Claimant's average weekly wage (AWW) as well as her compensation rate for total disability is $148.81.

7. Employer paid Claimant compensation for temporary total disability ("TTD") in the amount of $148.81 per week, totaling $27,210.97, from August 11, 1998 through February 18, 2002, except for the period from August 13, 1998 through August 20, 1998. (EX 1)

8. Employer paid medical benefits for treatment of Claimant's back condition under § 7 of the Act.

Claimant contends that she is entitled to compensation for TTD from August 11, 1998, the date of the low back injury, and continuing. Claimant also argues that she has a disabling causally related psychological injury, viz., depression, that resulted from the constant severe back and leg pain she experiences. Finally, Claimant contends that Employer is responsible for unpaid bills for her treatment for the psychological condition.

Employer, as noted, concedes that Claimant's TTD due to the back injury is causally related to the back condition resulting from the accident on July 28, 1998. However, Employer argues that Claimant does not have a causally related psychological condition and it is not liable for treatment Claimant underwent for such condition. Further, Employer argues that Claimant reached maximum medical improvement ("MMI") from her low back condition on January 24, 2001, based on the report issued on that date by Dr. Yarus. In addition, Employer posits that commencing on December 10, 2001 Claimant was no longer entitled to compensation for

[1]The following abbreviations are used. "CX" refers to Claimant's Exhibit; "EX" refers to Employer's Exhibits; "T" refers to the transcript of the April 17, 2003 hearing.

disability because it provided evidence of suitable alternative employment ("SAE") whose weekly earnings establishes that Claimant has had a wage-earning capacity that exceeds her AWW of $148.81 since December 10, 2001.

II. ISSUES

The issues to be resolved are:

1. Whether Claimant suffers from a causally related disabling psychological condition.

2. Whether Claimant attained MMI from her low back condition — thereby no longer being temporarily disabled due to that condition — and if so, when.

3.(a) Whether Claimant is able to return to her usual job with Employer.

(b) If not, whether Employer has established the availability of SAE and what was Claimant's resultant residual wage-earning capacity after SAE was available.

4. Whether Employer is liable for medical benefits for psychological treatment of Claimant pursuant to § 7 of the Act.

5. Whether Claimant's counsel is entitled to an attorney's fee pursuant to § 28 of the Act.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Evidence

Claimant was born on November 11, 1959. She married a U.S. military man and about 1986 she began to work for Employer at a military base in Germany. About 1992 Claimant began to work for Employer at the military base in Fort Stewart, Georgia where she was employed as a "Child Development Program Assistant." In this job Claimant monitored children of military service personnel and engaged in other activities with them. She worked full-time during the summers but only four hours a day at other times of the year. On January 28, 1998 Claimant injured her low back in lifting a cooler containing ice and about 45 small cartons of milk. (T 37-40) On March 19, 1999 Claimant underwent surgery on her back by Dr. Mark Gold consisting of decompression and fusion at L4-5 with the insertion of "instrumentation." (EX 21)

Claimant testified that as a result of her low back injury she experiences severe and chronic back pain and leg pain. She stated that the pain and the medication she took to alleviate it caused her to have depression for which she was treated by psychiatrists and therapists. (T 40, 45, 77-85) Claimant testified that due to the pain she must lie down about 1½ hours a day and is no longer able to use a vacuum cleaner, do laundry or engage in gardening. She is unable to sit

more than 30 minutes at a time. It takes her up to 20 minutes to wash dishes during which she must shift her weight from foot to foot. Claimant testified that she is unable to work full-time because she must lie down every afternoon and that in January 2002 she was unable to complete a program consisting of two hours of class one night a week for eight weeks because she missed three weeks due to pain. (T 54-64)

Claimant testified that after Employer's rehabilitation counselor, Barbara Byers, informed her of available jobs she applied for an office assistant job at Hershey Medical Center but she was not called back. Claimant also obtained a temporary job at Royer's Flower Shops but turned it down because Dr. Johnson restricted her to part-time employment. Claimant testified that in March 2002 she applied for a job at Lebanon Valley College suggested by Byers, but was told there was no job there. (T 64-72, 105-106) Finally, Claimant testified that she could do office clerical work, but that she needed to be pain-free to work. Subsequently Claimant stated that she was willing to try to do part-time work when she was pain-free, but explained that she did not mean absolutely pain-free and that she takes 80 milligrams of Oxycontin (prescribed by Dr. Johnson) every day for pain. (T 122-124)

Turning to the medical evidence, the pre-surgery lumbar MRI performed on December 16, 1998 revealed right disc herniation at L3-L4 with impingement of the right L4 nerve root, and small central disc protrusion at L4-L5. (EX 13) On February 15, 1999 Dr. Gold diagnosed L4-L5 disc herniation with congenital stenosis, and L3-L4 disc degeneration. (EX 18) On March 18, 1999 the physician proposed the surgery that he performed on March 19. (EX 20, 21) Post-surgery, the lumbar MRI performed on October 7, 2000 indicated degenerative moderate narrowing at each lumbar spine level, with moderate narrowing at L3-L4 and mild narrowing of L1-L2 and L2-L3; moderate central stenosis at L4-L5 due to disc bulging; mild central spinal narrowing at L3-L4 due to disc osteophyte complex and degenerative changes in the facet joints; moderate facet degenerative changes at L5-S1. (EX 32D) Additional post-surgical diagnostic testing is largely consistent with those MRI findings. (EX 24A, 28, 32A, 32B, 32C, 38)

The record contains numerous reports by treating and examining physicians. Claimant was initially treated on August 21, 1998 by Dr. Bernard DeKoning. (EX 8, 9, 11) She was next seen by Dr. Thomas Garigan who referred her for treatment to Dr. Wayne Woodbury who issued a report dated December 30, 1998. (EX 14, 15) Claimant next came under the care of Dr. Gold, who performed the spinal surgery in March 1999. (EX 16, 17A, 18, 19A, 20, 21) An independent medical examination was reported on February 26, 1999 (pre-surgery) by Dr. Clark Deriso. (EX 19) Dr. Gold saw Claimant post-surgery and issued reports dated March 29, April 26, May 3, June 7, August 31, 1999, and April 14, 2000. (EX 23, 24, 25, 27, 31) Dr. Gold's reports noted Claimant's continuing symptoms of back pain.

Dr. Gold referred Claimant to Dr. Wayne Woodbury for “physical reconditioning.” (EX 25) Dr. Woodbury issued a report dated July 8, 1999 who recommended a program of “strengthening for her reconditioned status,” including swimming. The physician stated that Claimant was “doing this on a routine basis.” Dr. Woodbury also stated he anticipated that Claimant would “advance her overall level of activity to the point of returning back to work.” He also recommended that she be approved to see a psychologist for assistance with “pain behavior and depression management.” (EX 26) On November 15, 1999 Claimant was

examined by Dr. Daniel Nagelberg, Ph.D. and licensed psychologist. (EX 28A) Dr. Nagelberg observed that Claimant was able to ambulate independently but said she limps if she has a bad day. She was able to get in and out of a chair without difficulty. He stated that Claimant's affect was flat, her mood appeared to be depressed, and she was quite irritated with her current situation (i.e., her pain and worker's compensation carrier). She appeared tense and anxious but was cooperative and understood and followed testing instructions without difficulty. Later she appeared uncomfortable "in her chair" as evidenced by "facial discomfort" rather than "pain complaints." Dr. Nagelberg stated that Claimant's prognosis was guarded and highly dependent on her "physical/medical status." He concluded by stating it would be helpful if she could get into a work recovery program.

Dr. Deriso examined Claimant a second time on March 23, 2000. (EX 30) He noted that Claimant had not done well with her spinal surgery and reported pain in the low back and the right leg. The physician found muscle spasm, a fairly good range of motion, negative straight-leg raising test ("SLR"), and a normal neurological examination and no objective localizing signs. Although Dr. Deriso opined that Claimant had what appeared to be an excellent pedicle screw fixation and interbody fusion she was still complaining of pain. The physician therefore suggested that a pain management program one year post-surgery would not be of benefit to Claimant. He concluded by stating that the impairment rating and the decision about whether Claimant can return to work should be decided by her surgeon, Dr. Gold. The final report of record from Dr. Gold is dated April 14, 2000. At that time Dr. Gold repeated his recommendation that Claimant be referred for "medical pain management and psychiatric assistance." He noted that this had not been approved by Employer and that Claimant was receiving antidepressants "from the Army base." Dr. Gold also made conflicting statements regarding MMI, that Claimant "has reached MMI" and that she may require an "FCE" (functional capacity evaluation) "once she has reached MMI." (EX 31)

Handwritten notes from the Winn Army Community Hospital dated April 17, 2000 by Dr. Randolph Capocasale state that Claimant appears to be depressed and tearful. The physician wrote that Claimant's main stressor was her dissatisfaction with her marriage and that she described her husband as abusive, etc. Many of these notes are illegible, but indicate that the physician prescribed medications for Claimant. (EX 31A) Handwritten notes by another physician at the same facility on May 2, 2000 appear to be in connection with a sinus condition Claimant had. (EX 31A)

After moving to her hometown of Lebanon, Pennsylvania, Claimant came under the care of Dr. Craig Johnson (Board certified in neurological surgery) on August 21, 2000; he last saw Claimant on March 7, 2002. (EX 32, 39) Dr. Johnson was deposed on April 17, 2003. (CX 1)[2] At the conclusion of his testimony Dr. Johnson stated that Dr. Gold's surgery resulted in a solid fusion at L4-L5 but that does not guarantee complete relief of Claimant's pain. The physician stated that other studies may show why Claimant continues to have pain and that her mild stenosis at L3-L4 may contribute to her ongoing symptoms. He opined that "we may need to

[2]In his deposition Dr. Johnson reiterated and explained the statements contained in his medical reports in EX 32, 35A, 37A, 38A, and 39. As I shall discuss Dr. Johnson's deposition testimony at length, there is no need to refer to each of his individual reports.

think about" extending the fusion to the L3-L4 level. (CX 1 at 74-75). However, Dr. Johnson did not express a clear opinion regarding whether Claimant had reached MMI.

In the course of his testimony Dr. Johnson stated Claimant complained of persistent low back pain and right lateral thigh pain, but no longer had pain in the right lower leg that she had pre-surgery. She did not complain of weakness in the lower extremities or symptoms in the left leg. Claimant walked with a normal gait; she had mild right lumbar paravertebral tenderness and no sciatic notch tenderness. Forward flexion of the lumbar spine was performed reasonably well to about the distal shin level. SLR was negative bilaterally. Neurologically she had normal strength and tone in all major muscle groups in both legs. Heel and toe walking were performed well. Deep tendon reflexes were normal. Dr. Johnson testified: "In short her neurological examination was normal." He stated a diagnosis of "chronic low back syndrome with right lower back pain and right lateral thigh pain since her surgery of March 1999" but said that the fusion at L4-L5 was apparently "solid" and there was no "surgically significant" abnormality. He noted an X-ray report revealing postoperative changes at L4-L5, mild disc degeneration at L3-L4 and a CT scan indicating a possible disc herniation at L3-L4. Dr. Johnson also stated that Claimant reported that she was depressed, but he did not know if she had been treated for depression. (CX 1at 9, 11-16)

Dr. Johnson testified that Claimant had the same complaints and her neurological examination was normal throughout his treatment of her. When Dr. Johnson last saw Claimant on March 7, 2002 the physician recommended that she go to Dr. Robert Campbell for pain management, to adjust her medication, and take over her care by managing her "chronic pain syndrome." Dr. Johnson's physician's assistant saw Claimant on September 24, 2002, at which time it was noted that Dr. Campbell had given her several epidural block injections but that her symptoms remained about the same. Dr. Johnson also referred to two notes from Dr. Campbell's associate Dr. Gregory Wickey who injected Claimant for the first time in May 2002 and the second time in June 2002. Dr. Johnson was aware of a subsequent epidural block prior to Claimant's last visit to his office on September 24, 2002. The June injection was stated to provide Claimant with relief from pain for about a week. (CX 1 at 17, 21-23) Ultimately, in March 2002 Dr. Johnson approved several jobs found by Byers that the physician believed Claimant could perform. (EX 44) This subject will be considered in detail below.

On May 7, 2001 Claimant was seen by Dr. Ward Barr, a neurosurgeon, who refilled her Ambien medication and told her that he would determine what other medications should be prescribed after his evaluation. Dr. Barr found no focal neurological abnormality related to Claimant's back or lower extremities and no back spasm. The physician stated that Claimant walked easily on heels and toes and performed a deep knee bend. He concluded that he found nothing that would require surgery. (EX 36)

On March 1, 2002 Dr. Anne Dall, a psychiatrist, issued a "Psychiatric Evaluation and Treatment Plan" for Claimant. (EX 40) Dr. Dall stated that Claimant exhibited multiple symptoms of major depressive disorder that were only partially controlled by her medications. Dr. Dall noted that Claimant had a history of more than one episode of abuse and that Claimant was also experiencing chronic pain. The physician recommended that Claimant resume therapy and prescribed several medications. In a brief note dated March 19, 2002 Dr. Dall stated that

Claimant had major depression related to chronic pain due to her back injury. (EX 41) In a report dated April 9, 2002 Dr. Dall stated that Claimant was still in severe pain and had difficulty sleeping. Dr. Dall stated: "Irritability persists, motivation is still poor. There are multiple stressors. She is still crying on a regular basis. She denies overt suicidal thoughts." (EX 50) On May 21, 2002 Dr. Dall noted that Claimant still had difficulty sleeping, "excessive" pain, poor motivation, and a depressed mood. (EX 51) In a report dated June 24, 2002 Dr. Dall reiterated the foregoing. (EX 52) In none of these reports did Dr. Dall express an opinion regarding whether Claimant's psychological condition affected her ability to resume employment.

Dr. Abram Hostetter, a psychiatrist, reviewed the medical evidence and examined Claimant at Employer's behest. In his report dated September 3, 2002, Dr. Hostetter stated that Claimant was dependent on narcotic pain medication (noting that she was taking the narcotic drug Oxycontin) and there was no clinical psychiatric diagnosis applicable to her. The physician noted Dr. Dall's diagnosis of major depressive disorder. Dr. Hostetter stated that Claimant was articulate, had good eye contact and gave no evidence of cognitive, memory or comprehension impairment. The physician stated that Claimant gave no evidence of having a depressed mood. Claimant reported to Dr. Hostetter that several physicians told her she was depressed due to the work injury. Claimant added that she thought the pain medications contributed to her depression. Dr. Hostetter concluded that Claimant did not have a psychiatric disorder as a result of a work injury. He attributed Claimant's "personality traits which are troublesome to her" and "emotional difficulties" to several stressors related to her social and family history. The physician stated that Claimant may benefit from counseling for those emotional difficulties, but he saw no need for counseling related to her work injury. He said that he would not place any psychiatric limitations on any job she can get within her physical limitations. (EX 57)[3]

The subsequent record shows that Dr. Wickey injected Claimant with epidural blocks approximately a half dozen times between October 22, 2002 and February 25, 2003. (CX 3)

Dr. Lance Yarus (Board certified in orthopedic surgery and pain management) examined Claimant at the behest of Employer on several occasions beginning on January 24, 2001. In his report of that date Dr. Yarus stated that he had reviewed most of the medical evidence of record. (EX 33) He noted Claimant's complaint of pain and stiffness with a burning sensation in her low back into her right leg and that she reported not being able to sit, stand, or walk long periods of time, and that she could not work. Dr. Yarus observed that Claimant was cooperative, interested, alert and oriented, and appeared to be in no distress. She had flattening of the lumbar spine but was able to forward flex and touch her toes. The physician reported that Claimant had extension to 15 degrees and excellent range of motion in rotation and lateral side bending. Patellar and Achilles reflexes were symmetrical and she could heel and toe walk. The remainder of the neurological examination was negative. At that time Dr. Yarus concluded that Claimant should continue being treated with medication for pain and that there was a causal relationship between her current symptoms and the accident on July 28, 1998. He diagnosed L3-L4 and L4-L5 disc pathology with herniation and compression, summarized as failed low back syndrome. With regard to Claimant's ability to return to work, Dr. Yarus referred to the "Work Restriction

[3]Dr. Hostetter noted that Claimant stated that if her pain were relieved she would work "because she thinks she has no psychiatric reason she could not work." (EX 57, p. 6)

Evaluation" form he completed on January 24, 2001, in evidence as EX 34. The physician opined that Claimant had permanent work restrictions and had reached MMI as further surgery would not be helpful. He also recommended that Claimant continue with home exercise. The physician's opinions about jobs found by Byers that Claimant could perform will be considered below.

B. Discussion

As noted above, Claimant alleges that she continues to be temporarily totally disabled due to pain and depression caused by the injury to her back on July 28, 1998. While Employer concedes that Claimant's back and leg pain are causally related to the work injury, it posits that Claimant has no causally related psychiatric or psychological condition. Further, Employer concedes that Claimant was totally disabled due to pain from the date she ceased working, August 11, 1998, until December 10, 2001, and paid her compensation for such disability until February 19, 2002.

Thus, Claimant has the burden of establishing that she has the psychological or psychiatric condition of depression and that it is causally related to the July 28, 1998 injury. Claimant also must establish that she continued to be disabled after December 10, 2001 due to any causally related condition and, if so, the nature and extent of the disability. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

1. Claimant has not established that she has a disabling psychological condition

No medical expert of record has stated the opinion that Claimant has depression or any similar condition that adversely affects her ability to perform work.

Dr. Nagelberg, a psychologist, saw Claimant in July 1999, about one year after she was injured. He stated that Claimant had a flat affect and appeared to be in pain and depressed. But Dr. Nagelberg did not state a clear diagnosis of depression nor give any indication that Claimant's ability to engage in work was adversely affected by her mood. Indeed, Dr. Nagelberg opined that it would be helpful if Claimant would get into a work recovery program.

In his report of April 14, 2000 Dr. Gold, who performed the spinal surgery on Claimant in March 1999, stated that Claimant should be referred for pain management and "psychiatric assistance." This is not a diagnosis of depression and, even if it were, Dr. Gold is not qualified to render such an opinion as he is not a psychiatrist or psychologist.

Dr. Capocasale, who saw Claimant on April 17, 2000, appears to be a psychiatrist. The physician stated that Claimant appeared to be depressed and tearful, and he prescribed medications. I find that Dr. Capocasale's statements are not clear diagnoses of depression. Further, he expressed no opinion regarding whether Claimant's ability to work was affected by depression.

Dr. Dall, a psychiatrist, saw Claimant at least three times, and stated a diagnosis of major depressive disorder. Dr. Dall opined that the depression was caused by pain that resulted from her back injury, and prescribed medication for depression. As noted above, however, Dr. Dall did not express an opinion regarding whether Claimant's psychological condition affected her ability to resume employment.

Dr. Hostetter, a psychiatrist, stated that he would not place any psychiatric limitations on any job Claimant could obtain within her physical limitations.

Based on the opinion of Dr. Dall, I find that the depression for which that physician treated Claimant was due to the back pain Claimant experienced that was caused by the 1998 injury. Thus, Claimant's depression, itself, was casually related to the 1998 injury. However, I find that Claimant has failed to establish by a preponderance of the evidence that she has a disabling depression or other similar disabling psychological condition. In short, despite the fact that Claimant was depressed due to the pain she experienced as a result of the 1998 injury to her back, there is no evidence that such depression significantly affects her ability to perform a job whose demands are within the appropriate physical restrictions for her.[4]

2. Claimant reached MMI on January 24, 2001

Claimant is entitled to compensation for temporary total disability until she reached MMI. At that time, if she remained disabled due to her 1998 injury, the nature of her disability would convert from temporary to permanent. Claimant argues that she continues to be temporarily totally disabled, while Employer contends that Claimant reached MMI and permanency of her back condition on January 24, 2001, based on the opinion of Dr. Yarus expressed in his report of that date. The date on which a claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his or her condition will not improve. Trask v. Lockheed Shipbuilding & Constr. Company, 17 BRBS 56, 60 (1985). Consequently, MMI or permanency is not reached where a condition is improving or improvement is expected. Dixon v. John J. McMullen & Assocs., 19 BRBS 243, 245 (1986).

In his report dated January 24, 2001 Dr. Yarus stated the opinion that Claimant had reached MMI because she would not obtain improvement from additional surgery. Although Dr. Yarus also stated that Claimant should continue to take pain medication, I infer from the general tenor of his report that the pain medication would maintain Claimant's back condition at its current level but would not improve it. Dr. Johnson, the physician who treated Claimant's back condition for the longest and most recent period of time – to March 7, 2002, did not express a clear opinion regarding MMI either in his deposition or his written reports.

Based on the opinion of Dr. Yarus, and the fact that Claimant continued to have the same pain after her March 1999 back surgery until January 24, 2001, I find that Claimant attained

[4]I make no determination as to whether any future psychological condition would be causally related to the 1998 injury.

MMI on January 24, 2001. At that time her temporary total disability converted to permanent disability. The extent of Claimant's causally related permanent disability thereafter, if any, remains to be determined.

3. Claimant is not able to return to her usual job with Employer; Employer has established SAE which shows that Claimant has no loss of earning capacity

If a claimant demonstrates an inability to perform his or her usual job, a prima facie case of total disability is established. The employer can then rebut by establishing the availability of other jobs which the claimant could perform. New Orleans (Gulfwide) Stevedores v. Turner, 661F.2d 1031,1038 (5th Cir. (1981).

Employer neither argues that Claimant is capable of returning to her job with it nor concedes that she is unable to do so. (See Employer's Brief, p. 25, in which it states simply: "Assuming the Claimant cannot perform her usual job...") However, it is clear that Claimant's job with Employer is too physically demanding for her to be able to perform with her present back condition, based on the evaluations by both Claimant's and Employer's experts, Dr. Johnson and Dr. Yarus.

The next question is the extent of Claimant's permanent disability. The Act defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." § 2(10) of the Act. Therefore, in order for a claimant to receive a disability award, he or she must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Once a claimant establishes that she is unable to perform her usual job with Employer, as in the instant case, the burden shifts to the employer to show SAE. If the employer fails to do so, the claimant must be found to be totally disabled. Manigault v. Stevens Shipping Company, 22 BRBS 332 (1989); MacDonald v. Trailer Marine Transp. Corp., 18 BRBS 259 (1986), aff'd., (No 86-3444) (11th Cir. 1987) (unpublished).[5]

To begin the consideration of SAE (i.e., Claimant's wage-earning capacity and the extent of her permanent disability), it must be noted that at the hearing Employer argued that Claimant is not entitled to disability compensation after January 24, 2001 and that it is entitled to a credit for compensation it paid after that date. (T 22-24) However, in Employer's post-hearing brief it states that Claimant's entitlement to compensation ceased as of December 10, 2001, when, Employer argues, it established that Claimant's residual earning capacity exceeded her AWW. (Employer's Brief, pp. 2, 29)

Employer relies on the available jobs in the area where Claimant resides that were identified by Byers and the opinion of Dr. Yarus who stated that Claimant could perform most of them and that of Dr. Johnson who said that she could perform some of them on a part-time basis. Under the circumstances, it is only necessary to consider the part-time jobs that both Dr. Johnson

[5]As Claimant's employment in which she was injured was in the state of Georgia, this case arises within the jurisdiction of the U.S. Court of Appeals for the Eleventh Circuit.

and Dr. Yarus found to be suitable for Claimant. However, I shall go beyond that in order to provide a more complete picture of the vocational evidence and the physicians' responses to it.

In a letter to Claimant dated December 7, 2001 Byers listed a number of types of jobs. (EX 43)[6] On December 11, 2001 Byers wrote to Dr. Johnson with descriptions of the following jobs from the Labor Department's "Dictionary of Occupational Titles":

- Administrative Office Assistant (General Clerk)
- Bookstore Clerk
- Receptionist/Customer Assistant
- Floral Consultant

On December 19, 2001 Byers sent Dr. Yarus a list of these jobs, plus additional jobs. Dr. Yarus approved of all the jobs on a full-time basis. (EX 45) On March 7, 2002, Dr. Johnson approved all of these jobs for Claimant on a part-time, but not a full-time, basis. (EX 44) Byers issued a report dated December 14, 2001 explaining the basis for her opinion that Claimant could perform the jobs identified in the attached Labor Market Survey ("Survey"). (EX 46, 47) Byers' Survey describes a number of specific jobs in the vicinity of Claimant's residence that were available between December 7 and December 10, 2001, including activities assistant at Manor Health Services and Luther Care, and hostess at Friendly's Restaurant.

I find that Dr. Johnson's rejection of full-time jobs for Claimant is entitled to greater weight than Dr. Yarus' contrary conclusion. It is clear that Claimant has continued to experience low back pain and would find it very difficult, if not impossible, to work 40 hours a week.[7] On August 27, 2002 Byers sent a list of part-time jobs to Claimant. (EX 54) In a letter dated October 14, 2002, Byers responded to questions Dr. Johnson had asked on September 29, 2002 about a housekeeper job at Outlook Pointe and a sales clerk job at the Hershey Museum. (EX 62) However, Dr. Johnson stated that Claimant could try the jobs of **restaurant hostess**, **activity aide**, and **customer service clerk** – all on a part-time basis – if Claimant could sit and stand as necessary while performing them. (EX 62) It is apparent that Dr. Johnson was referring to these three specific jobs at Hershey Resort and Conference Center listed in Byers' letter dated August 27. In a letter to Byers dated October 20, 2002, Dr. Johnson stated that Claimant could attempt the sales clerk job at Hershey Museum if she could sit and stand as she pleased and no walking was required. He also expressed concern about that job requiring twisting or bending at the waist. (EX 63) In his testimony, Dr. Johnson stated that Claimant's ability to work was restricted in that she was limited in sitting, standing and walking over a prolonged period of time, would

[6]Claimant testified that she did not recall receiving this letter, but she signed a receipt showing that it was delivered to her on December 24, 2001. (EX 69)

[7]As noted, in his letter dated January 2, 2002Dr. Yarus approved all of the jobs suggested by Byers, with no restrictions. (EX 45) Dr. Yarus expressed the same opinions in his reports dated August 16, 2002 and September 20, 2002. (EX 53, 66) On March 19, 2003 Dr. Yarus stated that Claimant could perform the floral consultant and bookstore clerk jobs on a full-time basis.

have to be able to change body position frequently, and should lie down if she felt it necessary. Dr. Johnson conceded that in March 2002 he had approved, on a part-time basis, the following jobs: floral consultant, receptionist, customer assistant, bookstore clerk, administrative office assistant, and general retail clerk. The physician testified that he did not know if Claimant could perform those jobs, but "these jobs seemed reasonable to perhaps try on a part-time basis." (CX 1, pp. 27-31) Although he later rejected a part-time restaurant hostess job, the physician testified that Claimant could try that job if she could sit intermittently as necessary. (CX 1, pp. 34-35) Byers testified that all the jobs she recommended were selected in conformity with the limitations Claimant described to her: sit for up to 30 minutes at a time; stand for up to 15 minutes at a time; walk for up to 20 minutes at time. (T 157-158)

In light of the above, the only jobs that need be considered in determining SAE are the part-time restaurant hostess, activity aide, and customer service clerk approved by Dr. Johnson as well as Dr. Yarus. Byers' Survey (EX 56) lists a hostess position at Hershey Lodge paying $7.25 per hour for 20 to 28 hours a week, available on January 23, 2002 and on subsequent dates. The Survey lists an activity attendant job at Hershey Lodge paying $6.00 per hour for 20 to 28 hours a week, available on December 3, 2001, December 4, 2001 and subsequent dates. The Survey lists a customer service clerk position at Hershey Resorts & Convention Center paying $6.00 to $6.25 per hour for 24 hours a week, available on December 3, 2001, December 4, 2001, December 11, 2001 and subsequent dates.

The weekly wages paid by these three part-time jobs exceed Claimant's AWW of $148.81:

Hostess	–	$7.25 x 21 hours = $152.25
Activity Attendant	–	$6.00 x 25 hours = $150.00
Customer Service Clerk	–	$6.25 x 24 hours = $150.00

As Dr. Johnson approved these jobs, I infer that he was of the opinion that Claimant could work up to 28 hours a week (the maximum number of hours listed for the activity attendant job). Even if Dr. Johnson was not aware of the number of hours involved in these jobs, there is no reason to believe that he would oppose Claimant's working five hours a day or 25 hours a week. In this regard, I note that in Dr. Johnson's letter dated September 15, 2002 he stated only that he did not believe Claimant could work an eight-hour day. (Attachment to CX 1, discussed by the physician at CX 1, p. 37.) Further, although Dr. Johnson spoke of "a four hour a day basis," this was in the context of his explaining his concern about a job description that could be interpreted to mean that the position required standing for four hours as well as walking for four hours in a day. (CX 1, p. 31)

Claimant argues in her brief that Byers' Survey does not adequately support the finding that Employer has established SAE because Byers' herself did not visit the potential employers and she had no personal knowledge of the requirements of the jobs. However, I find that Byers, a well-qualified vocational expert, and her staff, who contacted the employers by telephone, provided an adequate factual basis for the determination that the jobs in question were suitable and available. Claimant also argues that she "diligently sought appropriate employment." Claimant testified that she sought the floral consultant position but learned that it was a

temporary job to last only the one week prior to Mother's Day. Claimant also inquired about the bookstore clerk job at Lebanon Valley College, but was told that no job was available. Claimant also testified that she independently applied for an office assistant position at Hershey Medical Center, but got no response. (T 43, 65-67, 99; Claimant's Brief, pp. 15-17) I find that the foregoing does not significantly diminish the evidence that the restaurant hostess, activity aide, and customer service clerk jobs were available on the dates set forth in the Survey. Nor do Claimant's efforts in connection with the jobs of floral consultant, bookstore clerk and office assistant establish that she made reasonable and ongoing efforts to find employment.

Employer argues that SAE was established as of December 10, 2001. (Employer's Brief, pp. 2, 29) Apparently, Employer arrived at that date because it is the date of Byers' letter to Claimant (EX 43) in which the jobs of floral delivery driver, floral consultant and activities assistant were identified. However, this letter did not set forth the wages paid for the latter jobs, and I therefore find that they do not constitute SAE. Rather, I find that Employer has established the existence of SAE based on the part-time restaurant hostess, activity aide, and customer service clerk jobs described above. These jobs were available between December 3, 2001 and January 23, 2002 and thereafter. Consequently, I find that Employer has established the existence of SAE whose wages exceed Claimant's AWW as of January 23, 2002.

Based on the above, Claimant's entitlement to compensation for her permanent total disability (which commenced on January 24, 2001) ceased on January 23, 2002.

4. Employer is not liable for medical benefits for Dr. Dall's treatment of Claimant pursuant to § 7 of the Act

Claimant contends that Employer is responsible for her medical treatment by Dr. Dall for her emotional condition of depression because that condition is causally related to the 1998 work-related injury. (Claimant's Brief, p. 40) Employer argues that it is not responsible for paying for Dr. Dall's treatment of Claimant because there is no evidence that Claimant requested prior authorization by Employer for this treatment or that Dr. Dall filed attending physician reports on the form prescribed by the District Director, as required by § 7 of the Act. (Employer's Brief, p. 30)

I have found that the depression for which Dr. Dall treated Claimant was causally related to the 1998 injury. On the other hand, Employer is correct in stating that the record is devoid of evidence that Claimant made a prior request for Employer's approval of this treatment. Nor is there evidence that Dr. Dall submitted the requisite reports to Employer. Consequently, I am unable to find that Employer is liable for Dr. Dall's bills. §§ 7(d)(1) and (2) of the Act; 20 C.F.R. §§ 702.405 and .406.

5. Claimant's Counsel is entitled to an attorney's fee and costs pursuant to § 28 of the Act

Pursuant to § 28 of the Act, the attorney representing a claimant is entitled to a fee and reimbursement of costs where there has been a successful prosecution of the case. In the instant case, at the hearing Employer took the position that its liability Claimant's compensation due to the 1998 injury ceased on January 24, 2001 and that it is entitled to a credit for compensation it paid after that date. (T 22-24) However, I have found herein that Employer is responsible for the payment of compensation until January 24, 2002. Consequently, Claimant has achieved a successful prosecution of the case.

In addition, while Employer failed to pay Claimant compensation for the period of August 13, through 20, 1998 (EX 1), Employer provided no explanation for this omission. As I have found that Employer is liable for payment of compensation for temporary total disability for this omitted period, Claimant has also attained a successful prosecution for this reason.

IV. CONCLUSION

Claimant was temporarily totally disabled due to the 1998 injury from August 11, 1998 to January 24, 2001, and Employer is liable for compensation for such disability during that period at the weekly rate of $148.81. Claimant was permanently totally disabled due to the 1998 injury from January 24, 2001 to January 24, 2002, and Employer is liable for compensation for such disability during that period at the weekly rate of $148.81. As Employer's payment of compensation for the 1998 injury has exceeded the compensation to which Claimant is entitled at the present time, Employer need not pay Claimant additional compensation.

Employer is not liable for Dr. Dall's bills for treatment of Claimant.

Claimant's counsel is entitled to an attorney's fee and costs to be paid by Employer.

ORDER

It is ORDERED that:

1. Employer shall pay Claimant compensation for temporary total disability from August 11, 1998 through January 23, 2001and for permanent total disability from January 24, 2001 through January 22, 2002, at the rate of $148.81 per week.

2. Employer is entitled to a credit for all compensation for disability it previously paid Claimant.

3. Employer shall pay Claimant appropriate future medical benefits pursuant to § 7 of the Act.

4. Employer is not liable for the prior treatment of Claimant by Dr. Anne Dall.

5. Claimant's counsel is entitled an attorney's fee and costs, pursuant to § 28 of the Act.

6. Claimant's counsel shall submit his application for a fee and appropriate costs within thirty (30) days of the date of this decision, as set forth in the regulations at **20 C.F.R. § 725.366(a)**, and shall serve a copy on Employer as well as Claimant. Employer and Claimant shall have thirty (30) days from the service of the application to file objections. Claimant's counsel shall have fifteen (15) days after the service of objections to respond to the objections.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey